IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 243 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BAI SUKHIBEN

Versus

HIRABHAI HARIBHAI PATEL

Appearance:

MR MM TIRMIZI for Petitioner

MR ARUN H MEHTA with MR BM MANGUKIYA for Respondent No. 1 to 5

MR BY MANKAD, APP for Respondent No. 6

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision:01/12/2000

CAV JUDGEMENT

The Original Complainant Bai Sukhiben wife of Patel Hirabhai, who was a complainant in Criminal Case No.1012/85, which was pending on the file of the learned

J.M.F.C., Lunawada, District Panchmahals (who will be referred to hereinafter as `the learned Magistrate') has, by seeking permission of this Court under Section 378(4) of the Criminal Procedure Code, 1973, (In short `Cr.P.C.') filed this present Criminal Appeal under Sec.371 read with Sec. 378 of the Cr.P.C. and challenged the legality and validity of the judgment Exh.84 of acquittal rendered by the learned Magistrate in Criminal Case No.1012/85 on 16th January, 1990.

2. Here in this appeal, the appellant was a complainant while respondents No.1 to 5 were accused respectively in aforesaid Criminal Case No.1012/85, and therefore, parties will be referred to hereinafter as complainant and respective accused respectively at appropriate places.

3. The facts leading to this present Criminal Appeal in a nutshell are as follows:

3.1 On or about 6.11.1985, the complainant lodged her private complaint against five accused who are respondents in this appeal, in the Court of the learned Magistrate, and as per that complaint the case of the complainant can be summarised as follows:

3.2 The complainant is a legally wedded wife of accused No.1 who is her husband. As per her case, she married to accused No.1 as per Hindu Rites and Rituals and Customery Religious Ceremony, before many years. After marriage, she was staying with accused No.1 as his wife. It is the case of the complainant that, some years after the marriage, accused No.1 wanted to marry with another lady and therefore he was giving mental and physical tortures to the complainant and many times she was driven out from the house. It is the case of complainant that accused No.1 is serving as Professor in Lunawada College. He is also a President of Lunawada Taluka Panchayat. She has come with a specific case that, on or about 2.11.1985, the complainant solemnised a second marriage with accused No.2, who is a daughter of accused No.3 and 4 and sister of accused No.5. Before accused No.1 solemnised second marriage with accused No.2, when complainant came to know about an intention of accused No.1 to marry with another lady, she immediately filed one Regular Civil Suit No.166/85 against the accused in the Civil Court at Lunawada and she had prayed for a perpetual prohibitory injunction restraining accused No.1 from marrying with accused No.2. The Civil Court had granted an interim injunction pending the suit. It is the case of the complainant that, all the accused

deliberately avoided to get the summons of the Civil Court, served upon them and anyhow accused No.1 solemnised his second marriage with accused No.2 on 2.11.85 by changing date which was already fixed for marriage on 3.11.85 and thus before an interim injunction could be served on accused No.1, he solemnised his second marriage with accused No.2 though first marriage with complainant is still subsisting. Thereafter, on 6.11.85, the complainant lodged her private complaint against all the accused for offences punishable under Secs.494 and 114 of IPC. The learned Magistrate took cognizance against all the accused and issued summons returnable on 19.11.85. Thereafter, after following due procedure before framing of charge, the learned Magistrate by passing an order dated 1st September, 1988, below that private complaint lodged by the complainant framed charge against all the accused. That charge framed against accused on 1st September, 1998, is at Exh.42. The accused have not pleaded guilty to the charge and they have claim to be tried for the said case. The complainant has led following oral evidence.

(1) P.W.No.1 Sukhiben Hirabhai Patel (Exh.23)
(Complainant herself).

(2) P.W.No.2 Shivabhai Motibhai Patel Exh.27.

(3) P.W.No.3 Jayantibhai Khusalbhai Patel Exh.73.

3.3 Main case of complainant against accused No.1 against whom it is alleged that accused No.1 being her husband has solemnised another marriage with accused No.2 though his first marriage with complainant is still subsisting and therefore accused No.1 has committed an offence punishable under Sec.494 of IPC whereas accused No.2 to 5 have abetted accused No.1 in committing that offence by accused No.1 and therefore it is the case of complainant that accused No.2 to 5 have committed offences punishable under Secs.494, 114 of IPC. A specific question was put to accused No.1 that complainant Sukhiben has deposed in her evidence Exh.23 that her marriage was solemnised with accused No.1 and that she was staying with him as his wife. Thus, there is a relation of husband and wife in between accused No.1 and complainant. To this question, accused No.1 has not denied that facts but he has only stated that he does not know that facts. In the last question put to accused No.1, he has stated that complainant and her witnesses are keeping enimical relation with accused No.1 and his family members and the persons of rival political parties have instigated the complainant and therefore by stating

false facts, a false complaint has been lodged by complainant with a view to only harass accused No.1. The accused No.2 is, as alleged by complainant, a lady who illegally married with accused No.1 on or about 2.11.85. She has denied an entire case of the complainant. She has advanced her case in answers to last question put to her that a betrothal ceremony of daughter of her uncle was performed with son of brother of complainant and that engagement was, later on, broken and, therefore, due to social enmity the complainant has involved her falsely in the case. Thereafter, the learned Magistrate heard the arguments of the learned advocates of both the parties. The complainant's advocate submitted a written arguments at Exh.83, and thereafter, after analysing and appreciating the evidence of the witnesses and examining a documentary evidence led by the complainant, the learned Magistrate by rendering his judgment Exh.84 dated 16.1.1990, in aforesaid Criminal Case No.1012/85 came to a conclusion that complainant has failed to prove the case stated in her complaint for which a charge has been framed against the accused and therefore by said judgment he acquitted all the accused under Sec.248(1) of Cr.P.C. for offences punishable under Secs.494, 114 of IPC.

3.4 Being aggrieved against and dissatisfied with the said judgment of acquittal, the complainant filed one Misc. Criminal Application No.721 of 1990 (Leave to appeal) for seeking permission to prefer an appeal against the judgment. It appears from record that this Court (Coram: J.U.Mehta, J.) order dated 18.4.91 granted a permission and pursuant to that leave to appeal the complainant has filed this Criminal Appeal which is challenged before this Court.

4. I have heard Shri M.M.Tirmizi, learned advocate for the appellant i.e. original complainant, Shri A.H.Mehta, learned Senior Advocate and Shri B.M.Mangukiya, learned advocate both for respondents No.1 to 5 and Shri B.Y.Mankad, learned APP for the respondent No.6-State. I have gone through the judgment which is challenged in this appeal. I have also gone through the evidence led in the case.

5. It would be profitable to place on record the ambit and scope of such type of appeal preferred against judgment of acquittal.

5.1 In case of AJIT SAVANT MAJAGAVI Vs. STATE OF KARNATAKA reported in 1997 SCC (Cri.) 992. The Hon'ble Supreme Court has stated certain principles which would govern and regulate the hearing of the appeal by the High

Court against an order of acquittal passed by the trial court and that principles are stated in para 16 as follows:

"This Court has thus explicitly and clearly laid down the principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the trial court. These principles have been set out in innumerable cases and may be reiterated as under:

(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.

(2) The High Court has the power to reconsider the whole issue reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial court.

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(6) The High Court has also to keep in mind that the trial court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court especially in the witness-box.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

5.2 In case of Ramesh Babulal Doshi Vs. State of Gujarat reported in 1996(2) GLH 206, the Hon'ble Supreme Court has held in para 7 as follows.

"This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at own conclusions."

5.3 In case of STATE OF GUJARAT Vs. GOBAR @ GOPAL T. DHOLARIYA reported in 1996(1), 37 GLR 137. It has been held in para 7 as follows:

"Merely because on assessment of evidence, the trial Court could also take a different view, will not be a sufficient ground to disturb impugned acquittal order. This proposition is very well established by catena of judicial pronouncement. It is a settled proposition of law that where two reasonable conclusions are drawn on the evidence on record, the High Court should not (sic.) as a matter of judicial caution refrain from interfering with the order of acquittal recorded by the Court below. It is held by the Apex Court in Ganesh Bhavan Patel & Anr. Vs. State of Maharashtra, AIR 1979 SC 135

that if the main grounds on which the Court below has based its order acquitting the accused, are reasonable and plausible and not dislodged or demolished, the High Court should not disturb the acquittal recorded by the trial Court following the dictum of the Privy Council in Sheo Swarup V. Emperor, AIR 1934 PC 227."

5.4 Accused No.1 is charged for an offence punishable under Sec.494 of IPC while respondents No. 2 to 5 are charged for offences punishable under Secs.494, 114 of IPC. Under the circumstances, it is necessary to know as to what are the ingredients of Sec.494 of IPC. Sec.494 of IPC reads as follows:

"Sec.494 - Marrying action during life time of husband or wife :- Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

5.5 To prove an offence under Sec.494 of IPC following ingredients are required to be proved by the prosecution:

(1) The accused must have contracted the first marriage.

(2) He must have married again

(3) The first marriage must be subsisting.

(4) The spouse must be living and

(5) Both the marriages must be valid in the sense that necessary ceremonies must have been observed.

6. Keeping in mind the above legal position, now the rival contentions of both the parties are dealt with hereinbelow.

6.1 From the very beginning, the complainant has come with a specific case that accused No.1 is her legal husband and that her marriage with accused No.1 was solemnised as per Hindu rites rituals and Religious Ceremony before many years and after marriage, accused

No.1 and complainant were residing together as husband and wife. The complainant has deposed in her evidence that her marriage was solemnised with accused No.1 in her childhood and when she was about 15 to 16 years old, she was sent to matrimonial home of accused No.1, and since then she was staying with him as wife of accused No.1. If we read cross-examination of this complainant Bai Sukhiben, we find that accused No.1 has not challenged that marriage with complainant seriously. From cross-examination, it has come out from the evidence of complainant that complainant was unable to show as to what was her age when her marriage was solemnised and that she has no knowledge about that marriage. She has also stated that her elderly family members had informed her about her marriage with accused No.1. Even, in further statement, as said earlier, accused No.1 has not denied the fact with regard to his marriage with complainant. On the contrary, he has stated that he does not know about that marriage. Ignorance of the fact is totally different than denial of the fact. The complainant has produced a copy of written reply of accused No.1 in reply to application of complainant for interim injunction filed in Regular Civil Suit No.166/85 at Exh.76. If we read para 13 of that written reply of accused No.1 filed in the suit, we find that he admitted for the marriage solemnised with complainant. He has stated his case that when he attended age of adolescence, he came to know about the marriage with complainant which took place when they were in cradles. Thus first marriage with complainant is not so much seriously challenged by accused No.1. Even during the course of arguments, Shri Mangukiya has put much stress for absence of proof on the point of second marriage and not on the first marriage. The learned Magistrate has discussed evidence at length and he has come to a conclusion that first marriage is also not proved looking to the facts and circumstances of the case and entire evidence led by the prosecution. That finding is not correct. The complainant has with all possible available evidence proved her marriage with accused No.1. On the date of filing of the complaint, the complainant was alive and therefore third and fourth ingredients are proved beyond reasonable doubt.

7. To prove an offence under Sec.494 of IPC, wife of first marriage is required to prove second marriage of her husband with another lady. Here in this case, the complainant who being the wife of respondent No.1 has come with a specific case that on or about 2.11.1985, respondent No.1 married with respondent No.2 at village Ukardi. The complainant has specifically deposed in her

evidence at Exh.23 that an information with regard to second marriage of respondent No.1 with respondent No.2 was given to her by one Shivabhai Motibhai Patel, Motibhai Purshottambhai and Jayantibhai Khusalbhai and other persons. She has admitted that she has deposed about second marriage of respondent No.1 with respondent no.2 on the hearsay evidence. Thus, the evidence of complainant with regard to second marriage is based on information passed by three witnesses to her. Her evidence is not useful for proving a factum of second marriage because what she deposed before the court was deposed by her on placing reliance of hearsay evidence. Fact cannot be said to have been proved on the basis of hearsay evidence. In view of this legal position with regard to hearsay evidence, the complainant has examined Shivabhai Motibhai Patel at Exh.27. The complainant is residing in village Shamna and this witness also resides in the same village. He has deposed that he is doing an agricultural work. To prove the fact with regard to second marriage, this witness has deposed in his evidence at Exh.27 that about 11 months before date of his evidence i.e. 4.4.89, marriage in between accused No.1 and accused No.2 was taken place and that marriage was taken place at the house of accused No.3 who is admittedly father of accused No.2 at village Ukardi. He has advanced a case as to under what circumstances he had occasion to visit village Ukardi on a particular date on which second marriage took place. He has deposed that on that day his buffaloes were missing and therefore he and others were in search of that missing buffaloes and while visiting places from one place to another place he reached to village Ukardi. As per his say, he left village Shamna at about 8.00 p.m. and reached Ukardi at about 8.45 p.m. and during that period he could not search and trace out his missing buffaloes. He has deposed that when he entered into village Ukardi, he saw one taxi having been parked just outside the house of accused No.3 and about 25 to 40 persons were sitting outside the gate of house and accused No.3 was also sitting there. As per his say, accused No.3 called this witness i.e. Shivabhai Motibhai Patel by shouting his name and invited him to go to him. Accused No.3 took this witness inside the house where he(this witness) saw that about 20 other persons including ladies were sitting. He saw that marriage ceremony was going on. He saw accused No.1 and 2 and their marriage was being solemnised. As per his say, Brahmin who was performing that marriage was singing Chants, Ghee was being offered to fire as a part of religious ceremony, accused No.1 and 2 were sitting together, Brahmin who was performing marriage had completed ritual of "Hast Melap" accused

No.1 and 2 garlanded each other, accused No.1 and 2 took seven steps around the fire. Thus, practically he has deposed about the facts necessary to prove the factum of marriage.

7.1 This witness has not been believed by the learned Magistrate. An evidence of this witness Shivabhai Motibhai Patel has been discussed and dealt with in para 9 of his judgement. The learned Magistrate has observed in his judgment (Page 84 of the Paper Book) that two buffaloes of this witness were reported to have been missed at about 3.00 p.m. He was grazing that buffaloes and while he was grazing the buffaloes he went to his house for drinking water and when he returned after 10 minutes he found that his two buffaloes were missing. He has not stated as to why he proceeded towards village Ukardi. When he was in search of buffaloes, on he being invited by accused No.3 he went to the house of accused No.3 and attended the marriage. The learned Magistrate who recorded the evidence had seen his demeanour and thereafter he came to a conclusion that fact with regard to visit of this witness to village Ukardi on the ground that missing of buffaloes and fact with regard to witnessing of second marriage performed in his presence were not found believable mainly on the ground that this witness is a chance witness and on evaluating his evidence, he has come to a conclusion that this witness has got up an imaginary story of missing of two buffaloes.

7.2 During the course of arguments, Shri Mangukiya has submitted that this witness is a near relative of complainant. This witness has admitted in his evidence that his house is situated just on the side of the complainant's house and complainant, two brothers - one brother Govindbhai and another Motibhai Purshottambhai, are his good neighbourers and he has got good relation with these two brothers. As regards some enimical relation with the accused No.1 in cross-examination he has admitted that daughter of uncle of accused No.1 had been married with his brother and his brother had strained maritial relations with his wife i.e. daughter of uncle of accused No.1. A case has been suggested that his brother has given a divorce to his wife. From this evidence it clearly appears that this witness was somewhat close to the complainant side and he has some enimical relation with the accused No.1. Under the circumstances his evidence can be said to be evidence of interested witness. This Court is conscious of the fact that evidence cannot be discarded merely because witness is an interested witness. His evidence is required to be

scrutinised with more care and caution. Conduct of this witness is also required to be taken into consideration. He has deposed that after attending the second marriage of accused No.1 he left village Ukardi for Shamna at about 11.00 p.m. (night). As per his evidence he waited for about 1 1/2to 2 hours at the house of accused No.3. As per his say he straightway reached to his house and did not talk about this second marriage which he attended. When he admits that he is a neighbourer of complainant and he has got good relation with brothers of complainant naturally he would have rushed to the house of the complainant to inform them about second marriage which he attended. As per his say, on the next day in the morning at about 8.00 a.m. he informed Motibhai, brother of complainant about second marriage. He did not inform to any other person except Motibhai. Now complainant has deposed that she was informed by Shivabhai Motibhai Patel, Motibhai Purshottambhai and Jayantibhai Khusalbhai and others. Shivabhai Motibhai has admitted that he only informed to Motibhai brother of the complainant and therefore as per evidence of Shivabhai Motibhai what was informed to Motibhai was conveyed to complainant and, therefore, it is necessary to scrutinise the evidence of Motibhai because he received an information at the earliest point of time from this witness Shivabhai Motibhai, but, in this case, complainant has not examined that witness Motibhai brother of the complainant. The learned Magistrate has assigned cogent and plausible reasons for not accepting the evidence of this witness Shivabhai Motibhai. On reading the evidence of this witness Shivabhai Motibhai, this Court is of the view that the reasons assigned by the learned Magistrate for reaching to a conclusion that this witness is not believable are such that no other conclusions can be arrived at on discussion of evidence of said witness.

8. Here in this case, the Prosecution has not examined a Brahmin who performed the religious ceremony of second marriage. It has come in an evidence that Brahmin was one Kashi Kaka, who expired one year before 22.9.89, the date on which evidence of third witness Jayantibhai Khusalbhai Patel Exh.73 was recorded for the complainant, in the trial court.

9. The Prosecution has examined Jayantibhai Khusalbhai Patel at Exh.73 to prove the second marriage. He has deposed that accused No.1 has married with accused No.2 and their marriage was taken place on 1.11.85. When complainant herself is asserting that second marriage was taken place on 2.11.85, this witness has not given the

correct date on which second marriage was taken place. It is not possible that a witness might have forgotten the exact date but in that event he might have said that on or about 1.11.85, the marriage was taken place. Here in this case he has tried to give evidence with certainty that marriage was taken place on 1.11.85. He has given evidence as to how he come to know about this second marriage. He has deposed that his father-in-law is residing in village Ukardi and house of his father-in-law is situated opposite to house of accused No.2. As per his evidence, on that day he had been to village Ukardi and he was there at the house of his father-in-law. He has deposed that the second marriage was taken place in between 8.00 p.m. and 9.00 p.m. and about 20 to 25 persons were present and that marriage was performed by one Brahmin Kashi Kaka. This witness has deposed that one Shivabhai Motibhai had come from village Shamna when that marriage was going on and that Shivabhai Motibhai had gone to house of accused no.3. He has further deposed that after marriage, accused No.1 and 2 left the place of marriage by one Ambassador Car. He has further deposed that on next day he came to village Shamna and informed Sukhiben i.e. complainant and her younger brother Motibhai. This witness is residing in village Nani Pali. He is not residing in village Shamna. He had no reason to go to village Shamna. In cross-examination this witness has admitted that Motibhai Purshottambhai i.e. younger brother of complainant and father-in-law of his brother Kantibhai and they are near relatives. Naturally he would be inclined to help the complainant by deposing in favour of the complainant. This witness has not deposed that he had gone inside the house were the marriage was actually being performed. An evidence of this witness has been discussed and dealt with by the learned Magistrate and by giving cogent and plausible reasons he has come to a conclusion that this witness is not believable. If this witness was knowing the name of Brahmin who performed that marriage, he would have certainly informed the name of Brahmin to the brother of complainant because in this type of cases second marriage is required to be strictly proved and in that event had he informed the name of Brahmin to complainant she would have certainly stated the name of Brahmin either in complaint or in her evidence. The name of Brahmin has been disclosed for the first time in the evidence of this witness No.3. I have gone through the evidence of this witness in between the lines and I found that the learned Magistrate has rightly not believed his evidence. If we scrutinise the evidence of three witnesses, it is crystal clear that complainant was not present when second marriage was taken place. According to prosecution, she

was informed by Shivabhai Motibhai and her brother Motibhai and Jayantibhai. Jayantibhai is not examined, Motibhai Purshottambhai is also not examined. As per evidence of Shivabhai Motibhai Patel, he informed about the second marriage only to Motibhai Purshottambhai and in turn Motibhai Purshottambhai informed the complainant. When Motibhai Purshottambhai is not examined then what the information received by complainant from Motibhai Purshottambhai is hearsay evidence because in absence of evidence of Motibhai Purshottambhai, it cannot be accepted that what Shivabhai Motibhai Patel informed Motibhai Purshottambhai was conveyed to complainant. The witness Jayantibhai Khusalbhai Patel has not specifically deposed that he observed all the rites and rituals of the marriage ceremony performed by Brahmin. From his evidence, it appears that he did not go inside the house of the accused No.3.

9.1 Under the circumstances, the only witness on whose evidence prosecution relies, is Shivabhai Motibhai Patel and his evidence has not been accepted by the learned Magistrate for reasons assigned by the learned Magistrate in his judgment.

9.2 I have gone through the evidence of three witnesses in between the lines. The grounds stated by learned Magistrate for not accepting the evidence of said aforesaid three witnesses are cogent and plausible and therefore this Court is of the view that said evidence is not required to be reappreciated by this Court. I am of the view that had this Court appreciated this evidence of three witnesses, then this Court would have certainly come to same conclusion which is arrived at by the learned Magistrate and, therefore, this Court is of the clear view that the final decision arrived at by the learned Magistrate is not required to be disturbed by this Court.

10. For the fact of proving second marriage of accused No.1 with accused no.2, Prosecution relies on an evidence of Shivabhai Motibhai Patel (Exh.27). As per his evidence he had occasion to go to village Ukardi for searching his buffaloes which were missing co-incidentally on the day on which second marriage took place. He has deposed in his evidence with regard to rites and rituals of marriage ceremony which he had witnessed in the house of accused No.3. According to his deposition, the marriage ceremony was performed by one Brahmin who is reported to have expired before evidence of witness Jayantibhai Khusalbhai Patel was recorded in the case on 22.9.89. This witness Shivabhai Motibhai

Patel has also deposed with regard to "Hast Melap" and " seven steps" taken jointly by bride and bridegroom around sacred fire. The learned Magistrate has not believed an evidence of this witness on the ground that he is a chance witness. On reading his evidence, this Court finds that this witness is an interested witness because his house is situated just adjacent to house of complainant and further that Govindbhai and Motibhai who are brothers of complainant are his neighbourers with whom he has got good relation. Apart from this relation with brothers of complainant as neighbourer, he has further admitted that uncle's daughter of accused No.1 had married to his(witness) brother and lateron there were strain relations in between his brother and brother's wife i.e. uncle's daughter of accused No.1. He has also admitted that due to that strain relations, his brother had given divorce to his wife. Under the circumstances, naturally this witness must have some bitterness against accused No.1 and some sympathy for complainant and, therefore, his evidence is required to be scanned with due care and caution. The learned Magistrate has rightly appreciated the evidence of this witness and he has come to a conclusion that this witness is not believable. Mr. Tirmizi has argued that the learned Magistrate has not appreciated an evidence of this witness in its true and correct perspective and further that the learned Magistrate ought to have accepted an evidence of this witness as of believable witness. At this stage, it is required to know as to what is meant by appreciation of evidence. The process of appraising the evidence led by two parties can be equated almost to the process of holding a balance, the time honored symbol of justice. Sometimes when the two pans of the balance are seemingly equal even a slight evidence, circumstantial or otherwise, tilts the balance on one side and thereby probabilises the case of one party as against the other. In this process of holding the balance what pieces of evidence, of course excluding inadmissible evidence would lean the balance in favour of one party is dependent on the evidence available in a given case. But asking the revisional court to say that this piece of evidence should have weighed more than the other is nothing more than seeking a reassessment of evidence. Appreciation of evidence is a mental process involving selection, assessment and conclusion. Which statement ought to weigh and how much cannot be rigidly laid down. In this case the learned Magistrate has appreciated an evidence of witness Shivabhai Motibhai Patel in his judgment Exh.84 on Pages No.291 to 293 and also on Page No.297 of paper book. After appreciation of evidence of this witness Shivabhai Motibhai Patel, the

learned Magistrate has come to a finding on the fact with regard to presence of this witness in the house of accused No.3 when actual marriage ceremony was being performed which he found to be doubtful. He has also come to a conclusion that the facts stated by this witness are got up and his say with regard to his presence at the time of marriage is unnatural. The learned Magistrate has given more than one reasons for not believing this witness No.2. The learned Magistrate has taken into consideration each piece of evidence of this witness separately and individually after appreciating the evidence as a whole he has come to a conclusion that this witness is not believable. Under the circumstances, this Court is of the view that the learned Magistrate has rightly come to a conclusion that second marriage is not proved beyond reasonable doubt.

11. When this appeal was taken up for final hearing on 22nd September, 2000, Shri A.H.Mehta, learned Sr.Advocate for respondents No.1 to 5 appeared and argued at length and he has cited an authority of SANTI DEB BERMA Vs. SMT.KANCHAN PRAVA DEVI reported in AIR 1991 SC 816, wherein, the Hon'ble Supreme Court has held that when performance of `Saptapadi' is not proved and when there is no plea that marriage of accused was performed as per custom which dispensed with `Saptapadi' then that facts are not sufficient to draw an inference as to performance of ceremonies essential for valid marriage. Here in this case, when an evidence of witness No.2 Shivabhai Motibhai Patel is taken out or ignored then fact with regard to Saptapadi is not proved beyond reasonable doubt.

12. At the time of conclusion of arguments, Shri B.M.Mangukiya, learned advocate for Revision Opponents Nos.1 to 5 has appeared and argued that prosecution must prove that marriage was performed in a regular way after performing due ceremony for the marriage. For this, he has cited one authority of P.SATYANARAYANA AND ANOTHER Vs. P.MALLAIAH AND OTHERS reported in 1996(6) Supreme Court Cases 122. In that case also, the learned Magistrate of the trial court had recorded the prosecution evidence and came to a conclusion that there was no legal evidence to prove the factum of the marriage and then he acquitted the appellant of that case. The Andhra Pradesh High Court on a private revision by the respondent-wife upset the order of acquittal mainly on the ground that there was an admission of the first appellant in response to the charge led against him. The Hon'ble Supreme Court held that though accused (husband) had admitted in his plea that he had married after 10

years after his wife deserted and went away. Admission of the husband could at best be understood to mean that the first appellant had taken a wife but that admission did not necessarily mean that he had taken the second wife after solemnising a Hindu marriage with her after performing due ceremonies for the marriage. The Hon'ble Supreme Court further held that such place, which he need not have even entered upon, and which was ignorable by the Court, did not absolve the prosecution to otherwise prove its case, that the marriage in question was performed in a regular way so as to visit him with penal consequences. The Hon'ble Supreme Court set aside impugned order of the High Court and restored an order of acquittal passed by the learned Magistrate.

13. In view of aforesaid legal position with regard to proof of a case against accused No.1 for an offence punishable under Sec.494 of IPC, here in this case, most material evidence with regard to "Saptapadi" in accordance with rites and rituals for ceremonies performed by Brahmin is lacking and, therefore, case cannot be said to have been proved beyond reasonable doubt.

14. In view of what is discussed hereinabove and for the reasons given by this Court, this Criminal Appeal deserves to be dismissed for want of adequate and sufficient evidence to prove second marriage of accused No.1 with accused No.2 and, therefore, this Criminal Appeal is dismissed.

(H.H. Mehta, J.)

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